

No. 1155

In the Supreme Court of the State of New York

October Term 1807

Estate of WILLIAM S. HULL, Deceased - Messrs.
JONATHAN W. HULL and WOLMAN H. HULL, Ca-
rried out, Surviving Heirs, Executors.

City of Albany, October 10, 1807.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	5
Argument	8
 CITATIONS <hr/>	
Cases:	
<i>Colorado Bank v. Commissioner</i> , 305 U. S. 23	5
<i>Elmhurst Cemetery Co. v. Commissioner</i> , 300 U. S. 37	8
<i>Helvering v. Kehoe</i> , 309 U. S. 277	8
<i>Helvering v. Lazarus & Co.</i> , 308 U. S. 252	8
<i>Helvering v. Nat. Grocery Co.</i> , 304 U. S. 282	8
<i>Wilmington Trust Co. v. Helvering</i> , decided April 27, 1942 ..	8
Statute:	
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
See 23	2
Miscellaneous:	
Treasury Regulations 94:	
Art. 23 (e)-1	2
Art. 23 (e)-4	4

(1)



In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1155

ESTATE OF WILLIAM S. HULL, DECEASED, MESSRS.
JONATHAN W. HULL, AND WILLIAM HAROLD CAR-
PENTER, SURVIVING EXECUTORS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 13-22) is unreported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 104-107) is reported at 124 F. (2d) 503.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 23, 1942 (R. 107). The peti-

tion for a writ of certiorari was filed April 17, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Was there substantial evidence to support the determination of the Board of Tax Appeals that the stock of Primal Realty Corporation did not become worthless in 1936?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

- (1) if incurred in trade or business; or
- (2) if incurred in any transaction entered into for profit, though not connected with the trade or business

* * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 23 (e)-1. *Losses by individuals.*—Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise

are fully deductible if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, or (c) arising from fires, storms, shipwreck, or other casualty, or theft, and a deduction therefor has not prior to the filing of the return been claimed for estate tax purposes in the estate tax return, or (d) if not prohibited or limited by any of the following sections of the Act: Section 23 (g), relating to wagering losses; section 24 (a) (6), relating to losses from sales or exchanges of property between members of a family or between a corporation and its shareholders; section 112, relating to recognition of gain or loss upon sales or exchanges of property; section 117, relating to limitation on losses recognized by section 112 upon the sale or exchange of capital assets; section 118, relating to losses on wash sales of stock or securities; section 251, relating to income from sources within possessions of United States; and section 252, relating to citizens of possessions of United States. See section 213 as to limitation upon losses sustained by non-resident aliens.

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full con-

sideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113 (b).

* * * * *

ART. 23 (e)-4. *Shrinkage in value of stocks.*—A person possessing stock of a corporation can not deduct from gross income any amount claimed as a loss merely on account of shrinkage in value of such stock through fluctuation of the market or otherwise. The loss allowable in such cases is that actually suffered when the stock is disposed of. If stock of a corporation becomes worthless, its cost or other basis as determined and adjusted under section 113 is deductible by the owner for the taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness. Federal or State authorities incident to the regulation of banks and certain other corporations may require that stock be charged off as worthless or written down to a nominal value. If, in any such case, the basis of the requirement is the worthlessness of the stock, such charging off or writing down will, for income tax purposes, be considered *prima facie* evidence of worthlessness; but if the charging off or writing down is due to market fluctuations, or if no reasonable attempt has been made to determine worthlessness, no deduction for income tax purposes of the amount so charged off or written down can be allowed. For dealers in securities, see article 22 (e)-5. For

limitations on deductions for losses from sales or exchanges of capital assets generally, including stocks and bonds, see section 117.

STATEMENT

The Commissioner of Internal Revenue determined a deficiency in the income tax of the decedent, William S. Hull (hereinafter called taxpayer), for 1936. The determination was based upon disallowance of a deduction for stock of the Primal Realty Corporation, alleged to have become worthless in 1936 (R. 8-11). The Board of Tax Appeals sustained the Commissioner's determination (R. 13-23), and the Circuit Court of Appeals affirmed (R. 104-107).

The following evidentiary facts were found by the Board of Tax Appeals. In 1929 taxpayer purchased one-third of the stock of the Primal Realty Corporation for \$18,200. The balance was subscribed for by several other individuals. Primal Realty Corporation thereupon purchased six contiguous parcels of real estate on the corner of Eighth Avenue and West 115th Street, New York City. The price was \$157,500 of which \$54,600 was paid in cash and the balance was represented by mortgages. Taxpayer himself held the first mortgages, aggregating \$64,000, on four of the six parcels. There was also a second mortgage on the properties which was paid off in 1932. Each of the properties was improved by a five-story tene-

ment building with a store on the ground floor (R. 13-15).

So far as appears from the record Primal Realty Corporation has never given up title to or abandoned these properties. They continue to be managed for Primal Realty Corporation by O. D. and H. V. Dike, real estate agents, who own one-third of the stock of Primal (R. 15, 20-21).

The results of the operations of Primal for the years 1933 to 1937, inclusive, are as follows (R. 16-17):

Year	Gross rents	Net loss for the year	Deficit at the end of the year
1933.....	\$14,326.00	\$5,065.20	\$10,508.72
1934.....	13,270.30	7,475.32	16,468.62
1935.....	15,489.73	3,612.06	20,000.68
1936.....	16,374.94	6,255.70	26,336.36
1937.....	17,406.25	399.61	27,326.13

The balance sheet of Primal as at the end of 1936, appended to the corporation's income tax return for that year, showed assets of \$146,709.57 and liabilities, exclusive of capital stock, of \$118,445.95. The fair market value of the properties was \$99,000 in 1936 and had been the same in 1933, 1934, and 1935 (R. 16-17).

In 1933 the new Eighth Avenue subway began operation. In 1936 a change from white to colored occupancy was in progress. Both of these factors had a tendency to improve the rental value of the properties (R. 14-15, 19). It was the opinion of real estate men that conditions would improve, and

they did improve somewhat in 1937, although the improvement was not such as to cause any material increase in the value of the properties in the years 1937 to 1940 (R. 17).

In 1935 Primal assigned the income from each of the properties to the holder of the first mortgage on that property, and thereafter the rents were paid by the agents directly to the mortgagees (R. 15-16, 20-22).¹ In the summer of 1936 the city gave notice to Primal of violations of the Multiple Dwelling Law by reason of lack of fire-retarding and sanitary installations. An expenditure of about \$2,000 for each parcel was required to remove the violations. These expenditures were made and the work was done in 1937, 1938 and 1939. Receipt of the notices in 1936 was of no especial significance both because they were not complied with in that year and because the violations which they listed had existed for some time prior to 1936. (R. 16, 20.)

On the basis of these evidentiary findings, the Board held that there was no showing of an identifiable event clearly indicating worthlessness of the Primal stock in 1936, that any indicia of worthlessness in 1936 had been present for several years prior to 1936, and, consequently, that the taxpayer's estate had failed to show that the Primal stock

¹ Although the evidence is ambiguous as to whether the assignment to the taxpayer, which was oral, was made in 1935 or 1936, the Board found that the assignment occurred in the latter part of 1935 (R. 21-22).

became worthless in 1936. It concluded that the right to a deduction for loss realized in 1936 had not been established (R. 18-22). The Circuit Court of Appeals held that the Board's findings were supported by substantial evidence and accordingly affirmed its decision (R. 106-107).

ARGUMENT

The facts recited in the Statement show that there was substantial evidence to support the Board's finding that the shares of Primal Realty Corporation did not become worthless in 1936. Accordingly, the court below correctly affirmed the Board's decision. *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282; *Colorado Bank v. Commissioner*, 305 U. S. 23; *Helvering v. Lazarus & Co.*, 308 U. S. 252; *Helvering v. Kehoe*, 309 U. S. 277; *Wilmington Trust Co. v. Helvering*, decided on April 27, 1942, No. 775, present Term. There is obviously no occasion for further review by this Court.

Respectfully submitted.

CHARLES FAHY,

Solicitor General.

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

ARTHUR A. ARMSTRONG,

Special Assistants to the Attorney General.

~~April~~ 1942.

MAY